NO. 82-1032

In the Supreme Court of the United States

OCTOBER TERM, 1982

HERMAN J. DOUCET,

Petitioner

VERSUS

DIAMOND M DRILLING COMPANY,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONER

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ARGUMENT

I. THE FIFTH CIRCUIT DECIDED THE DOUCET CASE IN A MANNER WHICH CONFLICTS WITH THE DECISION OF THIS COURT ESTABLISHING THE STANDARD OF NEGLIGENCE.

Respondent's brief misinterprets the negligence standards established by this Court in *Scindia Steam Navigation Co. v. De Los Santos.*[1] Respondent dwelt upon those aspects of *Scindia* which established the shipowner's responsibility under §905(b) of the Longshoremen's and Harbor Workers' Act (L.H.W.C.A.)[2] for the defective condition of the ship's gear or equipment used in the stevedore's cargo operations or for dangerous conditions which "develop within the confines of cargo operations that are assigned" totally to the stevedore. 451 U.S. at 172. Unsafe shipboard "conditions" or "defective equipment" created unseaworthiness prior to the 1972 Amendments to L.H.W.C.A.; now it must be determined if they violate the "negligence" standard fashioned by the Court in *Scindia.* To be sure Diamond M violated its *Scindia* duties to remedy defective gear (a cross threaded pipe protector) and a dangerous condition (casing improperly positioned by the driller) both of which were known to the shipowner; as well as its duty to warn Doucet about these dangers.

But what the *Doucet* case is *really about* is the shipowner's responsibility under *Scindia* for the negligent actions or omissions of its own employees in the conduct of a joint offshore oilfield operation where the shipowner's employees had well defined integral roles, a situation not

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[1] 451 U.S. 156, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981).

[2] 33 U.S. 3 § 905(b); hereinafter abbreviated as §905(b).

really presented by *Scindia* stevedore cargo loading operations. *Scindia* held as "accepted that *the vessel may be liable if it actively involves itself in the cargo operations and negligently injures a longshoreman* or *if it fails to exercise due care to avoid exposing longshoremen to harm from hazards they may encounter in areas,* or *from equipment, under the active control of the vessel during the stevedoring operation.*" 451 U.S. at 167. In situations where the vessel's employees are involved in the operations, *Scindia* said, "the vessel owes to the stevedore and his longshoremen employees the duty of exercising due care 'under the circumstances.' "[3]

Doucet's casing company employer (analogous to the stevedore in *Scindia*) did not furnish the casing Doucet was asked to install, or the cross threaded metal protector on the casing he had to try to remove; or the roustabouts whose duty it was to remove the metal protectors before the casing reached the floor, or the driller whose duty it was to position the pipe. The Fifth Circuit flatly contradicted the record when it stated that there was no testimony "...from anybody on the drilling platform...that it had been understood that the roustabouts would remove stuck or "tight" metal protectors before sending them up."[4]

On the contrary, William Green, who was Diamond M's roustabout foreman at the time of the accident, said that when rubber protectors were ordered by the oil well owner, it was the normal duty of the Diamond M roustabouts to remove the metal protectors from each joint of casing on the pipe racks and to put a rubber protector on

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[3] 451 U.S. at 166, citing *Marine Terminals v. Burside Shipping Co.*, 394 U.S. 404, 415, 22 L.Ed.2d 371, 89 S.Ct. 1144 (1969).

[4] *Doucet v. Diamond M Drilling Co.*, 683 F.2d 886, at 890 (5th Cir. 1982).

the casing before it was sent to Doucet on the rig floor (TR. 90-91). Diamond M stipulated that rubber protectors were ordered to be used on the job. (TR. 123). Green testified: "IF YOU LEAVE THE METAL PROTECTORS ON THERE, WHEN YOU DRAG IT UP IT WILL DAMAGE THE THREADS AND IT WILL BIND" (TR. 88). Thus Green's uncontradicted testimony was that failing to replace the metal casing thread protector with a rubber one would forseeably and predictably cause thread damage, thereby making the metal protector unusually difficult to remove. One searches the Fifth Circuit's opinion in vain for any mention of Mr. Green—although his testimony was briefed for the Court. Ignoring testimony that conflicts with one's judicial opinion may be convenient but it is hardly a valid tool of the judicial process. By ignoring Green's uncontradicted testimony and Diamond M's stipulation, the Fifth Circuit "has so far departed from the accepted and usual course of judicial proceeding..." as to justify granting a writ of certiorari. U.S. Sup. Ct. Rule 17(a).

The Fifth Circuit conceded that "the jury could reasonably infer from the evidence that the roustabouts found it either *difficult or impossible* to remove the metal protector, so they simply sent it to the drilling floor where the casing crew would have to deal with it..." 683 F.2d at 890. If the roustabouts found it impossible to remove the metal protector while the 2,000 pound joint of 13 3/8 inch diameter pipe lay still on the pipe racks, could it possibly be "due care under the circumstances" for them to send the pipe up to Doucet when they *knew* he would have to try to remove the protector while the pipe swung suspended from a sling? The roustabouts *knew* the protector could not be removed by ordinary means, but Doucet had no means of knowing before he pulled on the wrench and hurt

his back, as the Court of Appeals admits, 683 F.2d at 891. Under *Scindia*, the roustabouts had a duty to warn Doucet of the problem before he found out about it the hard way. Instead, the Fifth Circuit has held, that *Doucet* had to assume the risks inherent in the Diamond M roustabout's refusal to perform their duties, which flatly defies Scindia's pronouncement that assumption of risk is not a defense to a §905(b) suit.

To make matters worse, the Court of Appeals ignored Robert Owen, a certified safety engineer, who testified that: (1) it was safer for the roustabouts to remove the protector from the casing on the pipe rack instead of making Doucet attempt the task while the casing was suspended from a cable (TR. 317-18), and (2) he had recommended use of the rubber protectors to two casing companies because they would "eliminate the problems they have with removing protectors." (TR. 309).

The Fifth Circuit ignored the testimony of the casing crew workers who said that the rubber protectors made their job less strenuous. For example, Dale Briscoe said when casing came up with a rubber protector on it "...you just unsnap it and it falls right off, *you don't have to fight with the steel protector to take it off.* You don't have to have a wrench to take it off, you just unsnap it and *it comes up easier and it doesn't hang up or nothing.*" (TR. 123). Doucet testified that it was easier to remove a cross threaded protector on the pipe rack, because "on the pipe rack the pipe is steady and on the floor it's hanging on about a thirty (30) foot sling and that sling swings around and you got to manhandle it...[T]he only way to take a protector off when it is stuck you got to jerk on it and every time you would jerk on it the swing would hit the thing." (TR. 197).

The Court of Appeals was captivated by a single sentence uttered by plaintiff's expert petroleum engineer, Paul Montgomery, in which he said he liked to use rubber protectors "not from a safety consideration, but for other considerations." (TR. 327). However, Mr. Montgomery also said "take the metal protectors off the pipe while it's on the racks...*to look at the threads and possibly eliminate a problem that you might have later on while you are actually running the casing...*" (TR. 327-328). The Fifth Circuit also omitted Montgomery's statements that: (1) installation of rubber protectors is "customarily done on the pipe racks,...by roustabouts...who are rolling the pipe into position to be lifted up..." (TR. 329); (2) removal of metal protectors on the pipe rack is done "just to facilitate removing it once you got it onto the floor." (TR. 333); and (3) that metal protectors should be removed" on the pipe rack because you are in a position of *having more people to work on that specific job and generally more time if you have trouble with a specific thread protector.*" (TR. 333).

After omitting most of Montgomery's testimony which supported the jury's finding that Diamond M was negligent, the Fifth Circuit plucked one question and answer by Montgomery out of the three day trial as follows:

> "Q. In this particular case, do you have an opinion as to whether the failure to remove the metal protector on the pipe rack and to replace it with a rubber protector made that casing operation unsafe at that time?"
>
> "A. Yes, I think it should have been removed on the pipe rack. (TR. 337). 683 F.2d at 892.

Despite the testimony of Diamond M's own foreman, Green; of the safety engineer, Robert Owen; of the casing crew members, all cited in brief to the Court, the Fifth Circuit concluded that "This one answer is the sole and only evidence in this record upon which a jury could rely in finding...that sending up the pipe with the metal protector amounted to actionable negligence." 683 F.2d at 892.

The Fifth Circuit was enthralled by the notion that noise on the drilling rig might have prevented the Diamond M driller, Billy Buchan, from hearing Doucet's request to raise the pipe to a proper working position. The Court of Appeals conceded, "The jury had a right to believe Doucet's testimony that he 'hollered' at Buchan to raise the pipe." 683 F.2d at 893. *Query:* who was in a better position to evaluate whether noise on a drilling rig kept Buchan from hearing the request: 6 members of a southwest Louisiana jury who have either worked on or lived in proximity to drilling rigs all their lives and who observed the demeanor of the witnesses or three members of a Fifth Circuit panel who had to rely on one offhand statement by a witness in a cold record that a rig is noisy? Also, if Emery Richard, who was "standing on a platform *five or six feet high located five or six feet from Doucet*", could hear Doucet's request, was the jury not justified in concluding that the driller who was only "five or six feet from Richard" could hear the request? 683 F.2d at 893. More to the point, under *Scindia*, was the jury not justified in concluding that a driller exercising due care "should have heard" the request?

The driller, Buchan, testified that it was his job to pull up on the joint of casing to a position "so that the men won't have to...bend over." (TR. 83). Buchan also said that he "would be looking at him [casing crewman] as it [the

casing] was being guided in to be sure that [he] stopped it at about the right height." (TR. 82-83) The Court of Appeal correctly concluded that: "We must assume that he [Buchan] was paying attention because Doucet testified that Buchan was looking at him at the time. Under *Scindia*, Buchan was obliged to position the pipe at a safe working height whether or not Doucet requested him to do so, because to do otherwise would not be exercising due care under the circumstances.

Joe Hawkes, Diamond M's Safety Supervisor, who is not mentioned in the Fifth Circuit's opinion, affirmed "*if [the driller] sees a piece of pipe coming up in an unsafe position*, he would also be in a position to assume responsibility since his hand is on the throttle *to move it to a safe position...*" Then Hawkes said that the driller's "*job is to watch [the pipe] closely when it's coming in and try to stop it at the position where they normally stop him at.*" (TR. 24)

The driller "failed to exercise due care to avoid exposing" Doucet to "harm from hazards" created by equipment "under the active control of the vessel," which *Scindia* defines as negligence under §905(b). Therefore, the Fifth Circuit's decision is "in conflict with" an applicable decision of this Court and writs should be granted.

II.THERE IS A THREE-WAY CONFLICT AMONG THE FEDERAL CIRCUITS CONCERNING THE EVIDENCE TO BE CONSIDERED IN THE REVIEW OF A JURY VERDICT

Respondent cites Justice White's statement in *Scindia* that appellate courts need not deal with the shipowner's liability "unless there is sufficient evidence to submit to the jury either that the shipowner was aware of

sufficient facts to conclude that the winch was not in the proper order, or that the winch was defective when cargo operations began and that Scindia was chargeable with knowledge of its condition." 451 U.S. 178. However, Justice White found in *Scindia* that there was "a triable issue" as to whether the shipowner was chargeable with knowledge of the defective winch. *Id.* The District Court in *Doucet* held that there was "a triable issue" as to whether Diamond M was chargeable with knowledge of the defective cross threaded protector (through its roustabouts) and of the improper positioning of the pipe (through its driller). When the jury returned a verdict for plaintiff, the District Court denied Diamond M's motion for a new trial, thereby concluding that the jury verdict was not "against the great weight of the evidence." *Cities Service Oil Co. v. Launey,* 503 F.2d 537, 540 (5th Cir. 1968).

In 1982, this Court reaffirmed the deference due factual findings by the District Court in bench trials under Rule 52(a) of the Federal Rules of Civil Procedure. In *Inwood Laboratories v. Ives Laboratories,* __ U.S. __ 102 S.Ct. 2182, 72 L.Ed.2d 606, 618 (1982), this Court reversed the Second Circuit's reversal of the District Court's judgment, saying: "An appellate Court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court might give the facts another construction, [or] resolve the ambiguities differently,..." This Court stressed that "Determining the weight and credibility of the evidence is a special province of the trier of fact." 72 L.Ed.2d at 616-617.

Pullman-Standard v. Swint, __ U.S. __, 102 S.Ct. 1781, 72 L.Ed.2d 66, 81, (1982) reversed the Fifth Circuit's reversal of a District Court decision, saying that while the Court of Appeals "acknowledged and correctly stated the

controlling standard of Rule 52,...the paragraph in which the court finally concludes"...its decision *"strongly suggests that the outcome was the product of the court's independent consideration of the totality of the circumstances it found in the record."*

We may compare, the Fifth Circuit's *coup de grace* to *Doucet* where the Court concludes by asking:

> "Could reasonable jurors differ over whether substantial evidence supported an inference that the driller had heard the "shouted" request and simply failed to honor it?"
> "On this issue, *we are left with an abiding conviction that they could not.*" 683 F.2d at 894.

Under *Scindia* the jury could find the driller negligent for his failure to properly position the pipe, whether or not he heard the request. It is transparent that the Fifth Circuit made the same "independent consideration of the totality of the circumstances" condemned by this Court in *Pullman.* Would it not be incongruous if this Court allowed the Fifth Circuit to circumvent the *Constitutional* limitations on its appellate review of facts in jury cases contained in the Seventh Amendment, after it prevented the Fifth Circuit from circumventing the *statutory* limitations on appellate review of facts in judge cases contained in Rule 52(a)?

Justice White, author of this Court's opinion in *Scindia,* tersely sums up the existing conflict among the Federal Circuits regarding standards of jury verdict review:

> ..."it is the Second Circuit's practice to examine *all of the evidence* in a manner most favorable to the nonmoving party. This is also the position of at least the Fifth and Seventh Circuits. Boeing Co. v.

Shipman, 411 F.2d 365 (CA5 1969); Panter v. Marshall Field & Co., 646 F.2d 271, 281-282 (CA7 1981). In the Eighth Circuit, however, it appears that only evidence which supports the verdict winner is to be considered. Simpson v. Skelly Oil Co., 371 F.2d 563 (CA8 1967). The First and Third Circuits follow a middle ground: the reviewing court may consider uncontradicted, unimpeached evidence from disinterested witnesses. Layne v. Vinzant, 657 F.2d 468, 472 (CA1 1981); Inventive Music Ltd. v. Cohen, 617 F.2d 29, 33 (CA3 1980). Thus, the federal courts of appeals follow three different approaches to determining whether evidence is sufficient to create a jury issue. See 9 Wright & Miller, Federal Practice & Procedure §2529, at 572. Because the scope of review will often be influential, if not dispositive, of a motion for judgment n.o.v., this disagreement among the federal courts of appeals is of far more than academic interest." *Schwimmer v. Sony Corp.*, __ U.S. __ 103 S.Ct. Rep. 362, 364, __ L.Ed.2d __ (1982). (Dissent).

Professor Wright and Miller say the Fifth Circuit's practice of examining *all of the evidence* "comes dangerously close to weighing the evidence," in violation of the Seventh Amendment. Wright and Miller, *Fed. Practice and Procedure*, §2529, p. 571. Indeed! Judge Frank once said that the Circuit Courts are toward the Supreme Court, "merely a reflector, serving as a judicial moon." *Choate v. Commissioner*, 129 F.2d 684, 686 (2nd Cir. 1942).The judicial moon should provide the same light on §905(b) cases in New York as it does in San Francisco or New Orleans. It will not unless this Court grants this writ and supplies bench, bar, and litigants with a uniform national standard for review of jury verdicts §905(b) cases.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the above and foregoing has this day been forwarded to all attorneys of record by depositing same in the United States mail, postage prepaid, and properly addressed to the said attorney, this 22nd day of January, 1983.

_____

I. Jackson Burson, Jr.